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IN THE COURT OF APPEALS OF INDIANA

JERRY SMITH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 02A04-0608-CR-458
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable John F. Surbeck, Jr., Judge
Cause No. 02D04-0406-FB-88

February 26, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Jerry Smith appeals his conviction and thirty-year sentence for Class A felony voluntary manslaughter. We affirm in part, reverse in part, and remand.

Issues

The issues before us are:

I. whether the State sufficiently disproved Smith's claim of self-defense; and

II. whether Smith's sentence is inappropriate.

Facts

The evidence most favorable to the conviction reveals that Smith lived with Colondra Benson and Lashonda Moore. On June 8, 2004, sometime after midnight, Smith returned home with Jeffrey Konkle. Smith, Konkle, Benson, and Moore sat together and talked for a while before Benson and Moore went upstairs to bed; Smith and Konkle continued talking in the kitchen. About forty-five minutes after they went upstairs, the women heard a commotion downstairs. Smith was banging on the walls and yelling for Benson and Moore to come downstairs. He also was yelling at Konkle to leave the house. Moore also remembered hearing Smith say that Konkle had a knife and had tried to stab him. Konkle's fingerprints were found on the blade of a large knife in the kitchen.

Konkle left the house through the back door. Smith exited through the front door, went to his truck, and retrieved a shotgun. Konkle walked around the side of the house to the front where Smith was. He continued walking towards Smith, who also partially

approached Konkle saying, "get back." Tr. p. 133. Konkle was unarmed, had his hands at his sides, and was not saying anything. After firing one warning shot, Smith shot Konkle once in the chest from a distance of a few feet, killing him. Smith then emptied the gun of ammunition, put the gun on the ground, and told Moore to call the police. Smith stayed at the scene until police arrived and arrested him.

The State originally charged Smith only with aggravated battery. Later, however, it charged Smith with murder and dismissed the aggravated battery charge. On February 2, 2005, Smith's attorney filed a motion for a psychiatric examination to determine Smith's competency to stand trial and for permission to belatedly file notice of a mental disease or defect. The trial court granted the motions. On August 2, 2005, after doctors had examined Smith, the court found he was incompetent to stand trial, and he was committed to Logansport State Hospital.

Smith suffers from bipolar disorder. At the time of the shooting, he was in a manic phase of the illness and had been awake for three consecutive days. However, no doctor believed that Smith was legally insane when he shot Konkle.

On November 30, 2005, Smith was found competent to stand trial after receiving drug treatment for his disorder. A jury trial was held on March 14-16, 2006. During trial, Smith primarily argued that he had acted in self-defense and also highlighted the evidence of his mental illness. The jury found Smith guilty, but mentally ill, of Class A felony voluntary manslaughter. On April 17, 2006, the trial court sentenced Smith to a term of thirty years. It acknowledged Smith's mental illness and lack of criminal history as mitigating circumstances but found that they were counterbalanced "by the nature of

this offense, the fact that this young man is dead, and that a reduced sentence would seriously depreciate the seriousness of this crime." Sentencing Tr. p. 23. Smith now appeals his conviction and sentence.

Analysis

I. Self-Defense

"The standard of review for a challenge to the sufficiency of evidence to rebut a claim of self-defense is the same as the standard for any sufficiency of the evidence claim." Wilson v. State, 770 N.E.2d 799, 801 (Ind. 2002). We will not reweigh the evidence or judge the credibility of witnesses. Id. "If there is sufficient evidence of probative value to support the conclusion of the trier of fact, then the verdict will not be disturbed." Id. Once a defendant claims self-defense, the State bears the burden of disproving the claim. Pinkston v. State, 821 N.E.2d 830, 842 (Ind. Ct. App. 2004), trans. denied. "The State may satisfy its burden by either rebutting the defense directly or relying on the sufficiency of evidence in its case-in-chief." Id.

At the time of this offense and Smith's trial, Indiana Code Section 35-41-3-2(a) provided that a person could use reasonable force to protect the person or a third person from what the person reasonably believed to be the imminent use of unlawful force. "However, a person is justified in using deadly force only if the person reasonably believes that that force is necessary to prevent serious bodily injury to the person or a third person or the commission of a forcible felony." Ind. Code § 35-41-3-2(a) (2005).[1]

[1] The self-defense statute was slightly modified in 2006.

The "reasonableness" of a defendant's belief that he or she was entitled to act in self-defense is determined from the point in time at which the defendant takes defensive action. Henson v. State, 786 N.E.2d 274, 278 (Ind. 2003). That belief must be supported by evidence that the victim was imminently prepared to inflict bodily harm on the defendant or, in the case of deadly force, to inflict serious bodily injury or attempt a forcible felony. See id.; I.C. § 35-41-3-2(a). Although a defendant's belief of apparent danger does not require that the danger be actual, the belief must be in good faith. Brand v. State, 766 N.E.2d 772, 781 (Ind. Ct. App. 2002), trans. denied. Additionally, the amount of force that an individual may use to protect him- or herself must be proportionate to the urgency of the situation. Pinkston, 821 N.E.2d at 842.

The evidence here is unclear as to the nature of the confrontation between Smith and Konkle while they were in the kitchen of Smith's residence. Smith was overheard saying that Konkle had attempted to attack him with a knife, and Konkle's fingerprints were found on a knife blade in the kitchen, although not on the knife's handle. Smith demanded that Konkle leave, and he did so, going through the back door. Smith, meanwhile, had gone out the front door to retrieve a shotgun from his truck. Konkle did apparently walk around the house and in Smith's general direction. However, according to Moore, Konkle was acting calmly, saying nothing, had his hands down, and was unarmed. Nevertheless, Moore believed Konkle posed a threat and it was necessary to shoot him in the chest with a shotgun at nearly point-blank range.

Regardless of what transpired in the kitchen, any possible immediate threat to Smith evaporated when Konkle left the house. Additionally, Konkle was unarmed and

not acting in a threatening manner when Smith shot him. At that point in time, Smith should not have had any reasonable belief that Konkle posed an imminent threat of inflicting seriously bodily injury or attempting a forcible felony. Additionally, even if Smith reasonably believed that Konkle posed some kind of threat when the shooting occurred, such shooting of an unarmed man clearly was excessive. It was appropriate for the jury to reject Smith's claim of self-defense by use of deadly force. The evidence supports his voluntary manslaughter conviction.

II. Sentence

Smith also challenges the thirty-year sentence he received. We first note that Smith committed this crime in 2004 but was not tried and sentenced until 2006. In the meantime, effective April 25, 2005, our legislature replaced our "presumptive" sentencing scheme with the current "advisory" sentencing scheme. This court generally has concluded that the presumptive sentencing scheme applies if a defendant committed a crime before April 25, 2005 but is sentenced after that date. See, e.g., Weaver v. State, 845 N.E.2d 1066, 1072 (Ind. Ct. App. 2006), trans. denied; but see Samaniego-Hernandez v. State, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005). The State here concedes that the presumptive sentencing scheme applies, and we will analyze the case accordingly.[2]

[2] We also note that no Blakely issue arises in this case because the trial court did not rely on aggravating circumstances to sentence Smith to a term exceeding the presumptive sentence. See Davidson v. State, 849 N.E.2d 591, 594 (Ind. 2006).

The thirty-year sentence Smith received was the presumptive sentence for a Class A felony. See I.C. § 35-50-2-4 (2004). When imposing a statutory presumptive sentence, a trial court is not required to list aggravating or mitigating factors. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006). "A trial court must set forth its reasoning only when deviating from the statutory presumptive sentence." Id.

The trial court here nevertheless did make a sentencing statement. If a trial court has issued a sentencing statement when it was not required to do so, that statement still is useful in determining whether the sentence imposed is inappropriate under Indiana Appellate Rule 7(B). See Gibson v. State, 856 N.E.2d 142, 147 (Ind. Ct. App. 2006). Rule 7(B) permits an appellate court to review and revise a sentence, including a presumptive sentence, that it concludes is inappropriate in light of the nature of the offense and the character of the offender. See Duncan v. State, 857 N.E.2d 955, 960-61 (Ind. 2006).

Regarding the nature of this offense, the trial court stated that it had "considered the nature of this offense, the fact that this young man is dead, and that a reduced sentence would seriously depreciate the seriousness of this crime." Sentencing Tr. p. 23. It is well-settled that the fact of the victim's death is not a proper aggravating circumstance in sentencing for a homicide, because such is a material element of the offense. See Edgecomb v. State, 673 N.E.2d 1185, 1198 (Ind. 1996). As for depreciating the seriousness of this crime by imposing a lesser sentence, it has been held that a "perfunctory recitation" of this aggravating circumstance is not adequate to support its use. Ingle v. State, 766 N.E.2d 392, 396 (Ind. Ct. App. 2002), trans. denied. The trial

court here did not elaborate as to why the nature and circumstances of this crime were such that imposition of a lesser sentence would depreciate its seriousness, aside from noting the fact of the Konkle's death.

Aside from what the trial court said in its sentencing statement, the State argues that the nature and circumstances of this crime were aggravating because Smith had "alternative choices" to killing Konkle, such as calling the police or avoiding contact with Konkle. Appellee's Br. p. 14. However, it necessarily is the case almost anytime a defendant is convicted of voluntary manslaughter and the evidence does not support a claim of self-defense that the defendant had "alternatives" to killing the victim. For the nature of an offense to warrant aggravating weight in sentencing, there should be some specific facts or circumstances that set the defendant's crime apart from those generally associated with the crime. See Powell v. State, 751 N.E.2d 311, 317 (Ind. Ct. App. 2001). It is unclear that Smith's commission of voluntary manslaughter was significantly more heinous than a "typical" act of voluntary manslaughter.

There also are reasons here to discount the heinousness of Smith's criminal act. It is undisputed that after shooting Konkle, Smith told Moore to call the police, he unloaded his shotgun and put it down, and he waited at the scene for police to arrive. In other words, Smith took no steps to conceal the fact that he shot Konkle and posed no threat to responding officers. It is difficult to say that the nature of Smith's offense warrants much, if any, aggravating weight.

Regarding Smith's character, the trial court appropriately noted that Smith has no criminal history and was found by the jury to be mentally ill at the time of the crime. A

complete lack of criminal history generally is recognized as a substantial mitigating factor. Cloum v. State, 779 N.E.2d 84, 91 (Ind. Ct. App. 2002). Furthermore, a defendant's age is highly relevant in determining the weight to be given to a lack of criminal history. Id. "Although the sentence for a sixteen year-old without a criminal history may be entitled to substantial mitigation . . . the sentence for a thirty-eight year-old without so much as a single arrest on his record should be entitled to even greater mitigation because he has avoided accumulating a criminal record for an additional twenty-two years." Id. (citing Loveless v. State, 642 N.E.2d 974, 976 (Ind. 1994)). Here, like the defendant in Cloum, Smith was thirty-eight at the time of this crime and had never been arrested, let alone convicted, for any offense. Smith's lack of prior criminal history is a character trait worthy of substantial mitigating weight.

Next, we address Smith's mental illness. When considering the mitigating force of a mental health issue, courts should weigh the extent of inability to control behavior, the overall limit on function, the duration of the illness, and the nexus between the illness and the crime. Covington v. State, 842 N.E.2d 345, 349 (Ind. 2006). A jury's finding of guilty but mentally ill increases the likelihood that a defendant's mental illness should be considered a significant mitigating circumstance in sentencing. See Ousley v. State, 807 N.E.2d 758, 762 (Ind. Ct. App. 2004).

Dr. Stephen Ross, a clinical and forensic psychologist appointed by the court to examine Smith, testified at trial. He opined that Smith was able to differentiate between right and wrong at the time of the crime and, therefore, that Smith was sane when he shot

Konkle. Additionally, there was little to no evidence that Smith experienced hallucinations or was psychotic or delusional.

However, Dr. Ross also stated that Smith had "clear" symptoms of experiencing a mental disorder, namely bipolar disorder, and that he was in a manic state of the disease at the time of the crime. Trial tr. p. 451. Furthermore, the disorder originally caused Smith to be incompetent to stand trial, which was alleviated by Smith's subsequent hospitalization and drug treatment. Dr. Ross also testified that although Smith was able to tell right from wrong and could control his behavior, someone in a heightened manic state of bipolar disorder, such as Smith was in at the time of the shooting, would have difficulty making correct choices and his or her decision-making ability would be compromised. Inability to sleep also is a symptom of bipolar disorder, and Smith had been awake for three days when he shot Konkle. Dr. Ross believed that Smith's mental illness played a role in the shooting, explaining:

> I think that he had been without sleep for three days, and just by his nature and by the disorder he was more emotional than most folks would be, and the fact that things took place fairly quickly with the decedent and the Defendant, I think it probably made it difficult for him to think through things but . . . in my opinion, the options were still there. He still could have made other decisions although the thinking was, it would have been difficult but I believe he was able to.

Id. at 476-77. Dr. Ross also opined that Smith "thought in his head that what he was doing was right." Id. at 479. Finally, Dr. Ross believed that Smith's bipolar disorder first manifested itself around June 2003, or approximately one year before the shooting.

The expert testimony in this case, which was uncontradicted, indicates that although Smith was not insane at the time of this crime, he did suffer from a serious mental illness that significantly contributed to the commission of the crime. It negatively impacted his decision-making processes. The illness, although not one from which Smith suffered for most of his life, had arisen well before the crime and continued thereafter, as plainly demonstrated by the finding that he was not competent to stand trial until after he had received inpatient psychiatric care. Smith was not psychotic or delusional, and his mental illness might not have been the most severe he could have suffered without being legally insane. He still was able to function in society. Nevertheless, we readily conclude that Smith's mental illness at the time of the shooting is a significant mitigating circumstance, especially in light of the jury's finding of guilty but mentally ill.

In sum, the nature of this offense is such that, although violent and disturbing, there is nothing to distinguish it as significantly more violent and disturbing than a "typical" voluntary manslaughter case. As for Smith's character, he had no involvement with the criminal justice system for the first thirty-eight years of his life, and a serious mental illness at least partially contributed to his commission of this crime. Our supreme court has held that a lack of criminal history, combined with a jury finding of mental illness, warrants significant mitigating weight. Crawford v. State, 770 N.E.2d 775, 782 (Ind. 2002). We conclude that the presumptive thirty-year sentence Smith received is inappropriate in light of the nature of the offense and Smith's character. We reverse that sentence and direct that Smith's sentence be revised to a term of twenty-five years.

Conclusion

There was sufficient evidence to support Smith's voluntary manslaughter conviction and the jury's rejection of his self-defense claim, and we affirm that conviction. We reverse Smith's thirty-year sentence as inappropriate and remand with instructions that his sentence be revised to a term of twenty-five years.

Affirmed in part, reversed in part, and remanded.

BAILEY, J., and VAIDIK, J., concur.